

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Petition of Core Communications, Inc. for	)	
Forbearance under 47 U.S.C. § 160(c) from	)	
Rate Regulation Pursuant to § 251(g) and for	)	WC Docket No. 06-100
Forbearance from the Rate Averaging and	)	
Integration Regulation Pursuant to § 254(g)	)	
	)	
Developing a Unified Inter-carrier	)	CC Docket No. 01-92
Compensation Regime	)	

**WRITTEN EX PARTE OF CORE COMMUNICATIONS, INC.**

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**WRITTEN EX PARTE OF CORE COMMUNICATIONS, INC.**

Core Communications, Inc. ("Core"), by its undersigned counsel, submits this written ex parte presentation in the above-captioned proceedings. At the outset, Core notes that its petition was granted by operation of law on April 27, 2007 when section 160's one-year deadline lapsed without the Commission either: (1) denying Core's petition or (2) finding a 90-day extension of the statutory deadline necessary to meet the requirement of section 160(a).<sup>1</sup> Notwithstanding that statutory grant, Core anticipates that the Commission will make some type of binding (issue an order) or nonbinding announcement (issue a press release or announce a

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<sup>1</sup> 47 U.S.C. § 160(c). On March 1, 2007, the Bureau *sua sponte* issued an order purporting to extend the section 160 deadline by three months. On March 28, 2007, Core filed an Application for Review of that Bureau Order, and in the Application, Core expressly noted that the Bureau's action on purported delegated authority was improper. As Core explained, to the extent that the Commission did not want Core's petition deemed granted by operation of law, Core invited the Commission either to (1) resolve Core's petition on the merits within the statute's one-year deadline or (2) issue an order setting forth a reasoned explanation as to why an extension of the twelve-month statutory deadline was "necessary." The Commission did neither, and as a result, Core's petition was deemed granted at the expiration of the one-year statutory deadline, April 27, 2007.

vote) regarding Core's petition at some undefined point in the future. Of course, the Commission is well aware that even if the 90-day extension is valid, the Commission must issue a final, judicially reviewable order prior to the expiration of the statutory deadline in order to prevent Core's petition from being deemed granted by operation of the statutory remedy contained in section 160. To the extent the Commission plans to do something as a claim to deny Core's already-granted petition, the Commission must take into account the discussion presented herein, which summarizes the record and incorporates recent, related filings before the Commission submitted by carriers participating in this proceeding.<sup>2</sup> If the Commission somehow takes a different view, it should explain that too.

## **I. INTRODUCTION AND SUMMARY**

The Commission has noted that Congress' goal in passing the 1996 amendments to the Communications Act was "to establish 'a pro-competitive, de-regulatory national policy framework.'"<sup>3</sup> "An integral part of this framework is the requirement, set forth in section [160] of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain specified findings with respect to such provisions or regulations."<sup>4</sup> Indeed, under section 160(a), "the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the

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<sup>2</sup> Specifically, Core incorporates explicitly and by reference the comments related to section 251(g) filed in CC Docket No. 02-39.

<sup>3</sup> *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as they Apply after Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶48 and n.135 (2007) (citing Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104<sup>th</sup> Cong., 2d Sess. 113 (1996)).

<sup>4</sup> *Id.*, ¶48.

regulation is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.”<sup>5</sup> In making its determination under section 160(a), the Commission must also consider pursuant to section 160(b) “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”<sup>6</sup> More specifically, section 160(b) directs the Commission to “consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunication services....”<sup>7</sup> Under 160(c), the Commission must deny, in whole or in part, a forbearance petition with a judicially reviewable writing, and if the Commission does not do so, a petition is deemed granted.<sup>8</sup>

In its April 27, 2006 petition, Core requested that the Commission, with respect to all telecommunications carriers, forbear from section 251(g) rate regulation and section 254(g) rate averaging and integration. More specifically, with respect to section 251(g), Core’s petition requested that the Commission forbear from enforcement of:

- Section 251(g) of the Act, and related implementing rules to the extent they apply to or regulate the rate for compensation for switched “exchange access, information access, and exchange services for such access to interexchange carriers and information service providers,”<sup>9</sup> pursuant to state and federal access charge

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 47 U.S.C. § 160(b).

<sup>8</sup> 47 U.S.C. § 160(c).

<sup>9</sup> 47 U.S.C. § 251(g).

rules; and

- Any limitation, by FCC rule or otherwise, on the scope of section 251(b)(5) that is implied from section 251(g) preserving receipt of switched access charges.<sup>10</sup>

With respect to section 254(g), Core's petition requested that Commission forbear from that statutory provision, and its implementing rules related to rate averaging or integration.

In its petition and in other filings before the Commission, Core amply demonstrated that its petition satisfies section 160's standards by any reasonable measure and under any burden of proof. Core demonstrated that rate regulation preserved under section 251(g) and section 254(g) rate averaging and integration has served only to enable regulatory arbitrage by incumbent local exchange carriers ("ILEC"). Preserving ILEC regulatory arbitrage at the expense non-ILEC carriers certainly is not necessary to ensure that the charges, practices, and classification of carriers are just and reasonable. Preserving ILEC regulatory arbitrage is certainly not necessary to protect consumers, nor is preserving ILEC regulatory arbitrage consistent with the public interest. Similarly, preserving regulatory arbitrage by ILECs does not "enhance" competition. As a result, Core's petition satisfies section 160(a)'s three-pronged test and 160(b) competition analysis.

Of course, none of this could be surprising to the Commission or the industry, and Core demonstrated with the Commission's own findings that its forbearance petition satisfies the

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<sup>10</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9168 (rel. Apr. 27, 2001) ("*ISP Remand Order*"), *rev'd on other grounds and remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003). Five years later, the Commission has taken no action to resolve the *WorldCom* remand.

requirements of section 160. The Commission explicitly and repeatedly has recognized that maintaining a section 251(g) “carve out” for telecommunications otherwise subject to 251(b)(5) creates regulatory arbitrage. As the Commission aptly noted well over two years ago:

[R]egulatory arbitrage arises from different rates that different types of providers must pay for essentially the same functions. Our current classifications require carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis. These artificial distinctions distort the telecommunications markets at the expense of healthy competition.<sup>11</sup>

Forbearance from section 251(g) rate regulation materially solves the regulatory arbitrage problem, as it results in having compensation for all “telecommunications” regulated under a single statutory provision, section 251(b)(5). Forbearance from section 254(g) similarly limits regulatory arbitrage by enabling originating carriers to pass through to their customers intercarrier compensation charges incurred in completing calls.

As explained at the outset, section 160(c)’s one year statutory deadline lapsed without the Commission either denying Core’s petition or finding it necessary to extend by 90 days section 160’s deadline. As a result, Core’s petition was deemed granted at the expiration of the one-year mark, April 27, 2007. To the extent the Commission makes some type of announcement regarding the merits of Core’s petition, the Commission should address definitively: (1) its application of section 160’s standards and ambiguous statutory terms and (2) all of the procedural issues raised by Core’s petition (many of which have been raised repeatedly before the Commission in other forbearance proceedings, but have been left unresolved by the Commission).

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<sup>11</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685, ¶15 (2005) (“FNPRM”).

**II. TO THE EXTENT THE COMMISSION ISSUES AN ORDER ON CORE'S ALREADY DEEMED GRANTED FORBEARANCE PETITION, THE COMMISSION SHOULD EXPLAIN HOW IT APPLIES SECTION 160'S STANDARDS AND HOW IT INTERPRETS SECTION 160'S AMBIGUOUS TERMS**

Although section 160 is an “integral part” of the “pro-competitive, de-regulatory framework” of the Act, the Commission has taken virtually no action to implement section 160. The Code of Federal Regulations is filled with several volumes containing many thousands of rules implementing the Communications Act, yet the Commission has promulgated only one rule – 47 C.F.R. § 1.53<sup>12</sup> – to implement section 160. As a result, key aspects of the Commission's views on section 160 are unknown, and the Commission appears to be avoiding making its views known to perpetuate its use of section 160 as an unconstrained, malleable device.

Foremost, the Commission has neither articulated nor consistently applied a burden of proof to forbearance petitions to determine whether sections 160(a) and (b) have been satisfied. While generally requiring a petitioner to make an affirmative demonstration that the test has been satisfied, it has been argued that statute requires the burden be placed on the Commission to demonstrate that forbearance is inappropriate. As Chairman Martin wrote in a separate statement:

I am also troubled by the fact that this item does not state that the burden, in judging a forbearance petition, is on the Commission. The language of section 10 places affirmative obligations on the Commission.... Despite the statutory language, the Commission has, in the past, placed the burden on forbearance petitioners to demonstrate that a regulation is no longer necessary.... In my

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<sup>12</sup> 47 C.F.R. § 1.53 merely provides that forbearance petitions need to be set forth as “separate pleadings” and must reference the statutory provision in order to trigger the statutory deadline.



view, the Commission ought to clarify that the burden lies with the Commission.<sup>13</sup>

Even though this “troubl[ing]” issue was identified five years ago, the Commission has done nothing to “clarify that the burden lies with the Commission” under section 160, and the Commission should use this proceeding to make a definitive statement to the extent it determines to issue an actual order.

Further, while section 160(a) requires that the “Commission shall forbear” from regulations if section 160(a)’s three-prong test is satisfied, the Commission has taken a wide variety of actions different from granting forbearance, including temporary rather than permanent forbearance from regulations,<sup>14</sup> extending the forbearance relief requested to telecommunications services not addressed on the record or in the petition for forbearance,<sup>15</sup> and imposing affirmative obligations and rule changes through the forbearance process.<sup>16</sup> Despite taking each of these actions, the Commission has failed to establish rules that delineate the appropriate types of “relief” that may be granted pursuant to the Commission’s forbearance authority.

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<sup>13</sup> *In re: Verizon Wireless’s Petition for Partial Forbearance From the Commercial Mobile Radio Services Number Portability Obligation, and Telephone Number Portability*, Memorandum Opinion and Order, 17 FCC Rcd. 14972, 14997-98 (2002) (Separate Statement of Commissioner Martin) (attached hereto at Tab A).

<sup>14</sup> *See, e.g., Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502 (D.C. Cir. 2003).

<sup>15</sup> *See, e.g., Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Third Memorandum Order and Opinion, 14 FCC Rcd., 10816 (1999).

<sup>16</sup> *See, e.g., Federal Communications Bar Association’s Petition for Forbearance From Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order, 13 FCC Rcd. 6293 (1998).

The FCC has never adopted any rules to guide the determination of whether, or to what extent, maintaining a regulation or statutory provision is “necessary,” within the meaning of section 160(a)(1), to ensure that “the charges, practices, [and] classifications” of telecommunications carriers or services are reasonable. Nor has the Commission ever set forth a means of determining whether the provision at issue is “necessary” for the protection of consumers, as required by section 160(a)(2). The Commission has stated that the word “necessary,” as used in section 160(c), sets a very low threshold, but the Commission has never articulated whether that same, low threshold applies to the word “necessary” as used in sections 160(a)(1) and 160(a)(2). As a matter of statutory construction, of course, terms used in the same statutory provision presumptively have the same meaning,<sup>17</sup> and to the extent the Commission issues an order on the merits of Core’s deemed granted petition, the Commission should explain its views on what the word “necessary” means in section 160(a), and explain how that relates to the Commission’s interpretation of the word “necessary” as used in section 160(c).<sup>18</sup>

The Commission similarly has neither clarified how the competition analysis interplays with section 160(a)(3)’s public interest mandate, nor explained what standard is to be applied to this determination. In fact, the Commission’s inconsistent application of the competition analysis, as well as its failure to provide clarity regarding the type of data that must be provided to support the competition analysis, resulted in the D.C. Circuit remanding a forbearance order to the Commission for further consideration in *AT&T Corp. v. FCC*, 236 F.3d

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<sup>17</sup> See, e.g., *Allen v. CSX Transp., Inc.*, 22 F.3d 1180, 1182 (D.C. Cir. 1994) (noting that “[i]t is a well established rule of statutory construction that a word is presumed to have the same meaning in all subsections of the same statute.”) (citation and internal quotation omitted).

<sup>18</sup> Chairman Martin similarly has criticized the Commission for not articulating a discernable standard for applying the term “necessary” as used in section 160. See 17 FCC Rcd. at 14997-98 (2002) (Separate Statement of Commissioner Martin) (attached hereto at Tab A).

729 (D.C. Cir. 2001).<sup>19</sup> The Commission needs to define the meaning of the phrases “promote competitive market conditions” and “enhance competition among providers,” as used in section 160(b). The Commission should not continue its practice of making such determinations on a one-off basis.

Section 160(c) has been the source of much disagreement since it was codified over ten years ago. It provides that any “telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission” requesting forbearance and imposes a one-year deadline for the Commission to deny forbearance petitions before the petitions are “deemed granted” by operation of law. Further, the “Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.” Finally, upon a finding that an extension is “necessary” to satisfy the forbearance requirements, the Commission is authorized to make a one-time extension of the statutory deadline for a period of ninety (90) days.

The extension portion of section 160(c) has been particularly troubling to date, and as noted, Core has filed a Petition for Review challenging the Wireline Competition Bureau’s authority to extend on its own section 160’s statutory deadline by 90 days. Pursuant to Section 155 of the Act,<sup>20</sup> the Commission has delegated to the WCB Chief the “authority to

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<sup>19</sup> The Commission never addressed this remand either. AT&T subsequently withdrew its petition.

<sup>20</sup> 47 U.S.C. § 155(c)(1) provides in relevant part:

When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions . . . to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing,

perform all functions of the Bureau, described in § 0.91,” subject to certain “exceptions and limitations.” 47 C.F.R. § 0.291. Here, the operative limitation is found in Section 0.291(a)(2).

**The Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.**

47 U.S.C. § 0.291(a)(2) (emphasis added).

When the WCB Chief identified, and even relied upon “significant questions” presented by Core’s petition as justification for granting a 90-day extension, by FCC rule he was stripped of any “authority to act on” Core’s petition in any manner whatsoever, including the ability to extend the time in which it would be “deemed granted.” Of course, to the extent the “guidance” provided by the Commission is that the WCB can extend section 160’s deadline for any reason at all, then the Commission unlawfully has written the “necessary” standard out of section 160(c).

A further procedural issue involves the interplay between the Commission’s obligation to deny a forbearance petition before the statutory deadline and the requirement that it issue a writing. This issue has arisen now in four separate appellate proceedings.<sup>21</sup> The

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determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter ....

<sup>21</sup> See e.g., *Fones4All Corp. v. FCC*, Case No. 06-75388 (9<sup>th</sup> Cir.) (currently pending), Brief for Respondents, 34 (“The Commission’s timely vote to deny the petition sufficed to prevent a ‘deemed granted’ under section 10(c)”); *Sprint Nextel v. FCC*, Case No. 06-1111 (D.C. Cir.) (currently pending), Opening Brief of the Commission, 27-28 (“the Commission takes action only upon a majority vote of the participating Commissioners,” and that “[w]ith four Commissioners voting, an order denying Verizon’s forbearance petition would have required the concurrence of at least three Commissioners.”); *Qwest Corp. v. FCC*, 482 F.3d 471, Brief for Respondents, 19-20 (“...it is reasonable to conclude that the Commission’s publicly-announced vote to adopt the order on review within the statutory deadline satisfied § 10(c)” and “... the Commission’s timely vote to adopt the order on review was sufficient to ‘deny’ Qwest’s forbearance petition and avoid a deemed grant.”); *In re Core Communications, Inc.*, 455 F.3d

Commission takes the view that section 160's writing requirement is an independent obligation, and that its vote is sufficient to deny a forbearance petition. This position, however, has not been codified by regulation and contradicts other regulations indicating the need for a written order as a component of official agency action.<sup>22</sup> To the extent the Commission plans to do anything other than announce that Core's petition was deemed granted at the close of the one-year deadline, the Commission should explain in detail its views of section 160(c)'s requirements. Such an explanation is particularly necessary to the extent the Commission takes the view that Core's petition has not already been deemed granted. In such an instance, the Commission must, at a minimum, issue an order explaining its views *prior* to the expiration of the 90-day extension

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267 (D.C. Cir. 2006), Brief for Respondents, 23-25 ("The Commission's vote on October 8, 2004, to grant Core's petition in part and deny it in part was sufficient to constitute action on the petition within the period established by Congress in 47 U.S.C. § 160(c)" and "[t]he Commission's regulations similarly confirm that the FCC's denial of a petition for forbearance may be made effective as of the vote to deny, even if the written order is issued subsequently.").

<sup>22</sup> The Commission's rules establish that a *decision* must, in fact, be a *written decision*. See, e.g., 47 C.F.R. 1.1527 ("The Administrative Law Judge shall issue an initial decision on the application as soon as possible ... [t]he *decision* shall include *written findings and conclusions*. ...") (emphasis added). The Commission has also recognized in other contexts that a vote is necessary, but not sufficient, to create agency action. See 47 C.F.R. 0.201 ("The Commission, by vote of a majority of the members then holding office, may delegate its functions either *by rule or by order* ....") (emphasis added). Similarly, official FCC action occurs on the date of **public notice** of an FCC decision. Under the Commission's rules, "public notice" for non-ruling making decisions means the date on which the order is released. See 47 C.F.R. § 1.4(b)(2) ("public notice means the date of any of the following events; . . . (2) For non-rulemaking documents released by the Commission . . . , the release date."). Thus, agency action for non-rulemaking proceedings is the date on which the full text of the FCC's order is released, not the date upon which a "vote to adopt" a proposed order takes place. *In the Matter of Adelphia Communications Corp.*, 12 FCC Rcd. 10759, 10760 (1997) (stating, "[I]n the instant matter, the public notice for the Order in question occurred on May 5, 1997, *since the full text of the Order was released to the public and press on that date.*") (emphasis added); see also *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974) (release of the full text of a Commission order constitutes official action).

purportedly granted by the Bureau to the full Commission, otherwise the Commission also will miss the purportedly extended deadline.

### **III. CORE'S REQUEST FOR FORBEARANCE IS PROPER UNDER SECTION 160**

In response to Core's forbearance petition, the ILEC representatives seeking to preserve their regulatory advantage over Core and others made two procedural arguments. First, some have argued that Core is not a proper petitioner. Second, some have argued that forbearance from section 251(g) rate regulation would not result in that "telecommunications" traffic falling under section 251(b)(5). Both claims are incorrect.

#### **A. Core Is A Proper Petitioner, And Core's Petition Is Proper**

A variety of rural ILECs claim that Core somehow "lacks standing" to petition the Commission for the forbearance Core has requested. That argument fails immediately. Section 160 states unequivocally that any "telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission" requesting forbearance from "any provision" of the Act or Commission regulation. Core easily satisfies that standard, as it is without question a telecommunications carrier.

In any event, even though the FCC is not an Article III court, all that Article III standing demands is that the petitioner allege personal injury fairly traceable to the conduct in question and that the identified harm can be redressed by the requested relief. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). Core easily meets that standard too. Core is injured by the application of disparate intercarrier compensation systems, which have the effect of harming Core. When Core sends traffic to ILECs, ILECs charge non-cost based "access" charges regulated under section 251(g), which in some cases are well over \$0.010 per minute. Moreover, unrebutted record evidence in this proceeding demonstrates that certain ILECs charge \$0.13 per

minute for traffic termination. When ILECs send traffic to Core, the ILECs pay Core much lower rates set under section 251(b)(5), which run approximately \$0.0020 per minute, and under the FCC's *ISP Remand Order*, which established a per minute rate of \$0.0007. As outlined in Core's petition and elsewhere, the Commission has repeatedly concluded that the cost terminating traffic is the same, regardless of statutory classification or traffic type, and as a result, Core suffers harm from the Commission's on-going perpetuation of disparate, irrational rate categories that favor ILECs and punish new entrants. Forbearance from section 251(g) rate regulation redresses this harm by placing all "telecommunications" traffic under section 251(b)(5). As a result, all intercarrier compensation rates are thus subject to a single standard for all telecommunications traffic and all carriers. In addition, the elimination of section 254(g) rate averaging and integration enables carriers to recover their traffic termination costs from their customers, which otherwise would be precluded.

Separately, the DC Circuit has determined that section 160 obligates the Commission to resolve forbearance petitions on the merits, even in cases where the requested relief is hypothetical and the telecommunications carrier doesn't even agree that the provision at issue creates regulatory obligations on the petitioning telecommunications carrier. As the DC Circuit has noted, the Commission "may not refuse to consider a [forbearance] petition's merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations."<sup>23</sup> Similarly, the Commission may not avoid Core's petition due to the pendency of the Commission's intercarrier compensation rulemaking, which the Commission convened over seven years ago, or any other on-going proceeding. The Commission rejected an identical

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<sup>23</sup> *AT&T v. FCC*, 452 F.3d 830, 837 (D.C. Cir. 2006).

argument in resolving a recent Qwest forbearance petition,<sup>24</sup> and that result precludes that rejected argument here.

**B. 251(b)(5) Applies To All “Telecommunications” That Falls Outside Of Section 251(g)**

Despite the clarity of Core’s petition and the notice afforded to carriers, some parties insist that grant of Core’s petition would create regulatory uncertainty by promulgating new regulations.<sup>25</sup> However, this view demonstrates a fundamental (intentional or unintentional) misunderstanding of forbearance and Core’s request. Under 47 U.S.C. § 160, forbearance does not result in any *new* regulation. Rather, the section gives the Commission the ability to refrain from enforcing certain provisions or regulations. Because the 1996 reciprocal compensation regime in 251(b)(5) applies to *all telecommunications*, carriers are fully aware of the rules and obligations embodied in that provision. There is no confusion created; instead, regulatory certainty is *increased* by unifying intercarrier compensation into a statutory regime that Congress applied to all telecommunications as a default.<sup>26</sup> Indeed, the Act clearly contemplates a transition to 251(b)(5) regulations for all “telecommunications” and pre-existing access charge rates have been preserved only temporarily through 251(g).

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<sup>24</sup> *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules as they Apply after Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶13 (2007).

<sup>25</sup> See Western Telecommunications Alliance Comments at 9.

<sup>26</sup> The Commission has stated that any intercarrier compensation reform should “require minimal regulatory intervention and enforcement.” *FCC Acts to Eliminate Outmoded Intercarrier Compensation Rules*, News Release (Feb. 10, 2005). Forbearance from 251(g) rate regulation clearly satisfies this Commission goal.



In 1996, Congress established the “reciprocal compensation” regime, codified in 47 U.S.C. § 251(b)(5). This regime imposes a duty on all local exchange carriers to establish reciprocal compensation agreements for the transport and termination of telecommunications. Section 251(b)(5)’s plain language imposes the reciprocal compensation duty on *all* “telecommunications,” which the Congress has defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”<sup>27</sup> Section 251(g), however, temporarily “carved out” from section 251(b)(5) certain categories of traffic that carriers were exchanging prior to the passage of the 1996 amendments to the Act. Thus, forbearance from section 251(g) eliminates the “carve out” and leaves in its place section 251(b)(5) and its associated regulations.

Any conclusion by the Commission that forbearance from 251(g) would not result in application of 251(b)(5) would have to mean that some of the traffic enumerated in 251(g) does not qualify as “telecommunications.” Such a result would be entirely nonsensical. The Commission’s own words and implementing rules confirm that each category of traffic enumerated in section 251(g) *is* “telecommunications” carved out temporarily from section 251(b)(5). For example, the Commission’s rules state that reciprocal compensation applies to “telecommunications traffic exchanged between a LEC and a telecommunications carrier..., except for *telecommunications traffic* that is interstate or intrastate *exchange access, information access, or exchange services for such access.*”<sup>28</sup> Similarly, the Commission and circuit courts

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<sup>27</sup> 47 U.S.C. §153(43).

<sup>28</sup> 47 C.F.R. § 51.701 (emphasis added).

have uniformly and without exception categorized each section 251(g) category as “telecommunications,” as defined in the Act, in various cases, orders, and notices.<sup>29</sup>

In 1999, the Commission noted that section 251(g) “is merely a continuation of the equal access and nondiscrimination requirements and nondiscrimination provisions of the [AT&T] Consent Degree until superseded by subsequent regulations of the Commission.”<sup>30</sup> In the 2001 *ISP Remand Order*, the Commission declared that section 251(b)(5)’s reciprocal compensation regime was subject to a temporary “carve-out” in 251(g).<sup>31</sup> “Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and

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<sup>29</sup> See e.g., *United States v. Western Elec., Inc.*, 969 F.2d 1231, 1234 (D.C. Cir. 1992) (defining exchange access as “the provision of exchange services for the purpose of originating or terminating interexchange telecommunications”) (quoting *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983)); *ISP Remand Order* at ¶44(2001) (information access is “the provision of specialized *telecommunications* services ... in connection with the origination, termination, transmission, switching, forwarding, or routing of telecommunications traffic to or from the facilities of a provider of information projects”) (emphasis added); *Western Elec.* at 1234 (“Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications.”). Similarly, in the *ISP Remand Order*, the Commission recognized that “*all* of the services specified in section 251(g) have one thing in common: they are all access services or services associated with access. Before Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points - both interstate and intrastate - beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time.” *ISP Remand Order* at ¶37 (emphasis added).

<sup>30</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 15 FCC Rcd. 385, 407, ¶47 (1999).

<sup>31</sup> *ISP Remand Order* at ¶32 (2001). The *ISP Remand Order* changed the “focus of [the] inquiry” to “the universe of traffic that falls within subsection (g) and not the universe of traffic that falls within subsection (b)(5).” *Id.* at ¶ 34. Thus, the analysis “begin[s] with the assumption that *all* traffic [i]s subject to reciprocal compensation unless it fit[s] within § 251(g)’s carve-out.” *Qwest Corp. v. Washington State Utilities & Transportation Comm’n*, 2007 WL 1071956 (W.D. Wash. 2007).

termination of *all* telecommunications traffic, – *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier. Farther down in section 251, however, Congress explicitly exempts certain telecommunications services from the reciprocal compensation obligations.”<sup>32</sup> The services delineated in section 251(g) – “exchange access, information access, and exchange services for such access” – were thus temporarily placed outside of section 251(b)(5).<sup>33</sup> Section 251(g) is merely a “transitional enforcement mechanism” designed to be a temporary solution.<sup>34</sup> Thus, “section 251(g) serves as a limitation on the scope of ‘telecommunications’ embraced by section 251(b)(5). . . .”<sup>35</sup>

Subsequent to the *ISP Remand Order*, the Commission issued a Notice of Inquiry regarding section 251(g) and the process for eliminating section 251(g)’s preservation of antiquated forms of intercarrier compensation. There, the Commission noted as follows:

[T]he Commission most recently interpreted section 251(g) in the ISP-Bound Traffic Order on Remand, where the Commission discussed the relationships between sections 251(g) and 251(b)(5). The Commission found that section 251(g) maintains the “receipt of compensation requirements that apply to “information access” services, and thus, the Commission concluded, excepts those services from the requirements of section 251(b)(5) that “carriers establish reciprocal compensation arrangements for the transport and termination of telecommunications.” That is, the Commission found that Congress, through section 251(g), “limited the reach of section 251(b)(5) to exclude ISP-bound traffic.” The

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<sup>32</sup> *ISP Remand Order* at ¶ 32.

<sup>33</sup> 47 U.S.C. § 251(g). In its *ISP Remand Order*, the Commission determined that ISP traffic was subject to the 251(g) carve-out provision. See *ISP Remand Order* at ¶3 (“Congress, through section 251(g), expressly limited the reach of section 251(b)(5) to exclude ISP-bound traffic”).

<sup>34</sup> *WorldCom, Inc. v. FCC*, 288 F.3d 430, 433 (2002) (quoting *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385, 407 (1999)).

<sup>35</sup> *ISP Remand Order* at ¶40.

Commission concluded that section 251(g) preserves the existing compensation regime for that traffic and the Commission's authority to change that regime.<sup>36</sup>

In this same Notice of Inquiry, the Commission acknowledged that one method of superseding the requirements of section 251(g) would be for the Commission to “*forbear from such requirements*” pursuant to section 160.<sup>37</sup>

In 2004, the Commission again recognized 251(g) as a “carve out” of “the scope of section 251(b)(5) by section 251(g), which preserves certain pre-Act equal access and interconnection arrangements, **including compensation arrangements.**”<sup>38</sup> Indeed, the Commission's forbearance grant in *Core* demonstrates unequivocally the operation of section 251(g)'s carve out and its interplay with section 251(b)(5). Under the original *ISP Remand Order*, the so-called “new market” bar set a 251(g) compensation rate of \$0.00 in the states of New York and Pennsylvania for Core. Upon grant of Core's forbearance request, Core became entitled to the state set 251(b)(5) compensation unless and until other provisions of the *ISP Remand Order* “kicked in” upon meeting of certain thresholds (*e.g.*, 3:1 ratio and mirroring rule). In 2005, the Commission again recognized that section 251(g) “carved out access traffic from the

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<sup>36</sup> *Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, Notice of Inquiry, 17 FCC Rcd. 4015, ¶9 (2002).

<sup>37</sup> *Id.*, ¶10 (emphasis added).

<sup>38</sup> *Petition of Core Communications, Inc. for Forbearance from 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Memorandum Opinion and Order, 19 FCC Rcd. 20179 (2004) (emphasis added) *aff'd In re Core Communications, Inc.*, 455 F.3d 267 (D.C. Cir. 2006).

scope of section 251(b)(5).”<sup>39</sup> Thus, forbearance from 251(g) rate regulation leave in its place 251(b)(5) rate regulation.<sup>40</sup>

For all of these reasons, there can be absolutely no doubt that forbearance from rate regulation pursuant to section 251(g)’s carve out subjects all “telecommunications” to section 251(b)(5). Forbearance from 251(g) rate regulation merely leaves whole what 251(g) “carved out,” or “remove[d] from a larger whole,”<sup>41</sup> and subjects *all* telecommunications to a unified rate regime of section 251(b)(5) reciprocal compensation, achieving the Commission’s stated intercarrier compensation goal. Any other suggestion by the Commission would contradict the structure of the statute and a raft of Commission precedent. Accordingly, forbearance results in the relief requested by Core and furthermore satisfies one the Commission’s longest outstanding policy goal: unifying intercarrier compensation regime under a single standard.

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<sup>39</sup> FNPRM at ¶79.

<sup>40</sup> There should be nothing surprising in the fact that forbearing from one set of regulations can leave in their place other regulations. For example, the Commission has in the past granted forbearance from “dominant carrier” regulation, and upon receipt of such forbearance, the formerly “dominant carrier” became subject to “nondominant carrier” regulation. *See, e.g., Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules as they Apply after Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶49 (2007) (forbearing from “dominant” carrier regulation and noting that as a result Qwest will be “subject to nondominant carrier regulation”).

<sup>41</sup> WordWeb Online, *Carve Out* (30 June 2007), available at <http://www.wordwebonline.com>.

#### **IV. CORE'S PETITION FOR FORBEARANCE SATISFIES THE REQUIREMENTS OF SECTION 160(A) AND SECTION 160(B)**

For eleven years, the Commission has repeatedly expressed the need to reform intercarrier compensation regulations into a unified regime to eliminate regulatory arbitrage.<sup>42</sup> Forbearance from section 251(g) rate regulation and 254(g) rate averaging and rate integration achieves both a unified regime and works to eliminate regulatory arbitrage. Those benefits alone are sufficient to support a Commission finding (in addition to the deemed grant) that Core's petition satisfies the requirements of sections 160(a) and (b).<sup>43</sup>

##### **A. Core's Request For Section 251(g) Forbearance Satisfies The Statute's Requirements**

ILECs were the only industry segment that opposed Core's request for forbearance from 251(g) rate regulation, yet in their recent comments in CC Docket No. 02-39, those same ILECs revealed that maintaining section 251(g) rate regulation is not: (i) necessary to constrain the actions of telecommunications carriers; (ii) necessary to protect consumers; and (iii) in the public interest. Furthermore, it is self-evident that maintaining different cost recovery schemes for providing identical functionality impedes and does not enhance competition. Competition

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<sup>42</sup> See e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15449, ¶1033 (subsequent history omitted) ("rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge"); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005).

<sup>43</sup> Indeed, the Commission has recognized that a single factual predicate is sufficient to satisfy all of the requirements of sections 160(a) and (b). *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as they Apply after Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶¶50-52, 73, 75 (2007) (finding that because Qwest lacks "market power" its forbearance petition satisfies sections 160(a) and (b)).

demands a system that enables carriers to receive equal pay for equal work. Accordingly, Core's request for forbearance from section 251(g) rate regulation satisfies the standards set forth in sections 160(a) and (b).

In CC Docket No. 02-39, a related on-going proceeding examining section 251(g), AT&T very recently agreed with Core that the requirements "maintained under section 251(g) no longer serve[] a valid regulatory purpose."<sup>44</sup> What's more, AT&T states that the Commission should find that section 251(g) has "been fully implemented by: the nondiscrimination and pricing requirements in sections 201, 202, 203, and 272(e), the section 251(b)(3) dialing parity requirements, and the interconnection requirements imposed by section 251,"<sup>45</sup> which includes section 251(b)(5)'s compensation requirements for the transport and termination of interconnected "telecommunications." Moreover, "the requirements carried over by section 251(g) are fully implemented by sections 251(a), (b) and (c) of the Act and the Commission's rules contained in Part 51."<sup>46</sup> As a result of the Commission's "comprehensive set of rules associated with interconnection," AT&T agrees with Core that the Commission "should find that 251(g) has been fully implemented by other sections of the Act or the Commission's rules,"<sup>47</sup> including section 251(b)(5).

Alaska Communications Systems similarly agrees that "[s]ection 251(g)'s obligations are irrelevant in the current competitive marketplace and superfluous in light of the

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<sup>44</sup> CC Docket No 02-39, Reply Comments of AT&T at 1 (filed June 26, 2007).

<sup>45</sup> *Id.*, 3.

<sup>46</sup> *Id.*, 8.

<sup>47</sup> *Id.*, 9.

Communication Act's other provisions...."<sup>48</sup> Moreover, "[s]ection 251(g)'s obligations are outdated and now act only as impediments to the Commission's goals of competition and deregulation,"<sup>49</sup> and "sections 201, 202, and 251(a) and (b)" of the Act make "section 251(g) superfluous."<sup>50</sup> At bottom, "[r]ules of general applicability have superseded section 251(g)'s requirements and the Commission no longer needs to enforce this provision."<sup>51</sup> Core couldn't agree more, and obviously forbearance from section 251(g) rate regulation is fully consistent with the requirements of section 160.

**B. Core's Request For Section 254(g) Forbearance Satisfies The Statute's Requirements**

A review of the record in the same 251(g) proceeding referenced above (*i.e.*, CC Docket No. 02-39) further demonstrates the propriety of forbearance from section 254(g). As the Commission has recognized, section 254(g) creates an implicit subsidy from interexchange carriers to ILECs, leading to artificially low rates that discourage competitive entry and development of advanced technology.<sup>52</sup> Regulatory arbitrage abounds as interexchange carriers are forced to pay above-cost rates for termination with no means to pass these costs to the cost causing end user.

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<sup>48</sup> CC Docket No 02-39, Comments of Alaska Communications Systems, Inc. at 2 (filed May 29, 2007).

<sup>49</sup> *Id.*, 3.

<sup>50</sup> *Id.*, 5.

<sup>51</sup> *Id.*

<sup>52</sup> FNPRM, ¶¶84-86.



Perhaps 254(g) made sense when local and long distance services were provided by separate companies as a result of Divestiture. Today, however, bundled services and intermodal competition have become the norm, eliminating the need for 254(g). Technological innovation and deployment has eliminated any consumer protection rationale for maintaining 254(g), and indeed, 254(g) has been high-jacked by rural ILECs to maximize inflated access charges. This is why the Commission recently suspended the tariffs of 39 rural ILECs,<sup>53</sup> some of whom have been the most vocal opponents of forbearance from 254(g). Carriers need to be able to recover the cost of termination, and section 254(g) wrongly acts to preclude that cost recovery.

Moreover, market-based competition has created the very consumer protection that 254(g) attempted to obtain through heavy-handed regulatory means. As Verizon recently noted, wireless “all distance plans, beginning in 1999 and 2000, led to massive displacement away from landline long distance calls and reversed what had been a steady increase in wireline long distance minutes. To compete, Verizon and other wireline companies responded to these plans with their own comparable offerings. Today, service providers of every variety – wireline, cable, wireless, and VoIP alike – now all routinely offer distance-insensitive calling plans.”<sup>54</sup> “[T]he widespread availability of facilities-based bundled offerings from cable operators and wireless carriers ensures that consumers have a choice of service plans that included unlimited long distance,” and consumers also “can choose from an array of over-the-top VoIP services and resale offerings.”<sup>55</sup>

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<sup>53</sup> *In the Matter of Annual Access Charge Tariff Filings*, Order, WCB/Pricing No. 07-10 (June 28, 2007).

<sup>54</sup> CC Docket No 02-39, Reply Comments of Verizon at 2 (filed June 26, 2007).

<sup>55</sup> CC Docket No 02-39, Comments of Time Warner Cable at 4-5 (filed May 29, 2007).

Just this year in analyzing the long distance market, the Commission itself has found that stand-alone long distance services is a “fringe market.”<sup>56</sup> USTelecom has emphasized that “[t]oday’s communications market is one in which competition between stand-alone long distance providers is increasingly displaced by competition among providers of all-distance bundled services.”<sup>57</sup> Moreover, “there are more wireless handsets than fixed lines, broadband and VoIP services have exploded, and consumers can swap between fixed, mobile, and VoIP serviced and the flat-rated or bundled distance plans available on each platform.”<sup>58</sup>

There is no longer a separate stand-alone long distance market, but rather “market forces drive competition for long distance service as part of bundles, rather than as stand-alone products.”<sup>59</sup> Wireless and VoIP “all distance” products are widely available throughout the nation, including places such as Alaska, Hawaii, and the U.S. territories. As just one example, the Commission most recent data released by the Commission show there are 10 wireless carriers serving Alaska, four wireless carriers serving Hawaii, and six wireless carriers serving Puerto Rico.<sup>60</sup> Other modes of telecommunications capability, such as VoIP and cable, are similarly widely available, and basic Internet research demonstrates the bundled telecommunications

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<sup>56</sup> *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules as They Apply after Section 272 Sunset*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶16 (rel. 2007).

<sup>57</sup> CC Docket No 02-39, Comments of USTelecom at 5 (filed May 29, 2007).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, 5.

<sup>60</sup> See Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, Local Telephone Competition: Status as of June 30, 2006 at Table 14 (Jan. 2007). This compilation of FCC statistics demonstrates without question broad, intermodal competition in telecommunications throughout all parts of the nation.

packages are widely available throughout the nation, including Alaska and Hawaii.<sup>61</sup> Indeed, competition is so robust in Alaska that the Commission was able to forbear from Alaska Communications Service's obligations to provide competitors with access to unbundled local loops (classic bottleneck facilities) and unbundled transport.<sup>62</sup>

There simply is no legitimate rationale for preserving section 254(g) as a vehicle by which rural ILECs can preclude other carriers from recovering termination costs. The virtual elimination of the stand-alone long distance market further supports the elimination 254(g) rate averaging and integration requirements. Accordingly, forbearance from the IXC rate integration/averaging requirements contained in section 254(g) is appropriate, as the Commission itself has recognized.<sup>63</sup>

**V. ALTHOUGH BY NO MEANS NECESSARY, THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT TEMPORARY TRANSITION RULES IF IT FEELS COMPELLED TO**

Some commentators assert that granting Core's Petition will "flash cut" to a new regulatory regime, upsetting the business expectations of ILECs without a proper transition period.<sup>64</sup> However, the Commission has "question[ed] the wisdom" of claims that carriers have

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<sup>61</sup> Attachment B contains readily available product descriptions demonstrating the wide availability of low cost telecommunications offerings in Alaska and Hawaii.

<sup>62</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 1958 (2007).

<sup>63</sup> FNPRM at ¶86.

<sup>64</sup> Note that the business expectations sought to be protected arise from the very regulatory arbitrage incentives that the Commission is seeking to eliminate in its intercarrier compensation reform proceeding. See FNPRM at 4792.

a business expectation to perpetuate regulatory arbitrage.<sup>65</sup> In the FNPRM, the Commission noted that “carriers have been on notice for almost four years that the Commission was considering significant reform of intercarrier compensation regimes.”<sup>66</sup> Two years after the FNPRM, incumbent carriers have had even more time to adjust their expectations to the economic realities of a unified regime. That adjustment time has historically been a prime factor in determining the length and necessity of transitional periods.<sup>67</sup> Accordingly, courts have consistently upheld Commission and other agency directives that provide for immediate implementation without transition plans.<sup>68</sup> Additionally, federal law provides that agencies can

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* The Commission generally charges carriers with notice of its proceedings, orders, and notices, expecting carriers to act appropriately. *See ISP Remand Order* at ¶83. For instance, in the *ISP Remand Order*, the Commission suggested the Order should prompt all LECs to “begin to formulate business plans that reflect decreased reliance on revenues from intercarrier compensation, given the trend toward substantially lower rates....” *Id.*

<sup>67</sup> *Cf. Administration of the North American Numbering Plan Carrier Identification Codes (CICs)*, Petition for Rulemaking of VarTec Telecom., Inc., Second Report and Order, 12 FCC Rcd. 8024, ¶ 36 (1997) (shortening a transition to four digit CICs from six years to two because carriers “had reasonable notice about the need to upgrade their systems to accept four digit CICs”); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 20541 (1996) (“No transition period between the CMRS carriers’ LNP implementation and participation in mandatory number pooling will be granted because such carriers have almost two years’ advance notice of the pooling requirement.”). The condition of the market is another factor. *See 2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd. 22668, ¶¶ 7, 84 (2000).

<sup>68</sup> *See, e.g., Bellsouth Telecomm. v. MCIMetro Access Transmission Servs., LLC*, 2007 WL 807062 (N.D. Ga. 2005) (upholding an FCC order that lacked a transition plan for new competitors in the face of a Georgia Public Service Commission interpretation that the FCC permitted an indefinite transition for competitors).

sometimes move forward with immediate implementation of rules or regulations.<sup>69</sup> In light of this tradition, a transition period is not necessarily required and arguments to the contrary neglect Commission precedent.

Even if the Commission were to deem a transition period necessary, the fully developed record in Docket CC No. 01-92 allows for easy adoption of a suitable plan. In its FNPRM, the Commission explicitly sought comments on implementation and transition issues involved in reforming the intercarrier compensation regime.<sup>70</sup> As a result, transition issues have been fully briefed with hundreds comments submitted in response to the FNPRM.<sup>71</sup> The Commission is free to use these comments to craft an implementation plan, as it does from time to time.<sup>72</sup> Any truly transitional plan will be entitled to substantial deference.<sup>73</sup> Moreover, the Commission recently demonstrated that it has authority to impose conditions and regulations on a

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<sup>69</sup> An agency is exempt from normal notice requirements when “the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B).

<sup>70</sup> FNPRM at ¶¶62, 115, 150.

<sup>71</sup> A search on the FCC’s EFC Comment Search engine produced 345 comments submitted after the release of the FNRPM in March 2005.

<sup>72</sup> For example, the Commission adopted a transitional plan to reform access charges by creating a benchmark that competitive local exchange carriers were required to attain through equal steps over a period of years. *See In the Matter of Access Charge Reform Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 (2001).

<sup>73</sup> *See e.g., Competitive Telecom.* at 14 (“avoidance of market disruption pending broader reforms is ... a standard and accepted justification for a temporary rule”); *MCI Telecom. Corp. v. FCC*, 750 F.2d 135, 140-41 (1984) (asserting that transitional measures are “accorded substantial deference”).

grant of forbearance,<sup>74</sup> and this precedent would similarly support a temporary transitional plan, to the extent the Commission feels one is needed.

In addition to transitional issues, other parties have criticized the Petition for creating an environment hostile to ILECs by stripping them of access charge revenues. However, forbearance does not in any way deny the ILECs cost recovery. Rather, carriers simply recover their costs under the section 251(b)(5) pricing standard, rather than under the section 251(g)'s pricing standard. State commissions continue to set 251(b)(5) rates under section 252(d), as they have done for the last eleven years, in accordance with the Commission's pricing standard.<sup>75</sup> In rare instances where a state commission may not have set rates, default proxies would apply.<sup>76</sup> Forbearance from section 251(g) rate regulation simply leaves no gap. Section 251(b)(5) and the processes for establishing intercarrier compensation rates and payments cover the entire waterfront of intercarrier compensation issues.

## **VI. CONCLUSION**

The Commission should grant Core's Application for Review and announce that Core's forbearance petition was deemed granted at the close of April 27, 2007. To the extent the Commission determines to do something different, it should affirmatively grant Core's petition or otherwise announce that it has been deemed granted by operation of law on or before July 25, 2007, the date the Bureau set for the Commission. If the Commission is inclined to place conditions on a grant of Core's petition, or to deny Core's petition in whole or in part, the

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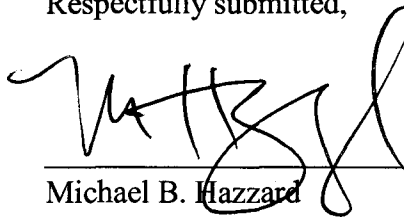
<sup>74</sup> See generally *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as they Apply after Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207 (2007).

<sup>75</sup> See 47 C.F.R. §§ 51.505, 51.11.

<sup>76</sup> See 47 C.F.R. §§ 51.701-19.

Commission must issue a reviewable order on or before July 25, 2007, if it wishes to have any hope of preventing Core's petition from being deemed granted. Any reviewable order (or similar item) issued after July 25, 2007, should set forth the Commission's views as to why it believes its actions were sufficient to foreclose the "deemed granted" remedy provided by Congress in the statute and the other issues of statutory construction presented herein and elsewhere in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. Hazzard", written over a horizontal line.

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July 6, 2007

**TAB A**



**SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN,  
APPROVING IN PART AND DISSENTING IN PART**

*Re: Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, Memorandum Opinion and Order, WT Docket No. 01-184, CC Docket No. 95-116*

I vote in support of the Commission's decision to deny Verizon's petition for permanent forbearance from the Commission's wireless number local portability (LNP) rules but to grant carriers a twelve-month extension to come into compliance. I dissent, however, from this item's discussion of the legal standard used to assess Verizon's petition.

1. Under the standard adopted by the majority, I do not find a sufficient basis for granting Verizon's petition for permanent forbearance, and I agree that the Commission's LNP mandate is "important" for the protection of consumers.

As I have previously explained, I believe that competition is preferable to regulation. Market forces are the best method of delivering choice, innovation, and affordability to consumers across our nation. But that does not mean that the Commission has no role to play. The Commission has an important role to play in creating an environment in which competition can flourish. And where there are market failures, the Commission may need to step in and take action.

The inability of consumers to keep their phone numbers when they switch carriers can be an impediment to competition. It imposes a cost to switching carriers, which, for many consumers, could be significant. In order to make a switch, consumers must contact the full range of people from whom they expect to receive calls, and many must also change business cards, letterhead, advertisements, and professional directories. These costs not only provide a disincentive for consumers that may want to switch providers, they also disadvantage new entrants to the market.

Thus, LNP can be important for competition. It allows consumers to choose a cheaper or more innovative wireless service without incurring some of these not insignificant switching costs. Moreover, it allows consumers more easily to replace their wireline phones with wireless phones, providing direct competition to the incumbent wireline telephone providers. A recent poll found that 18 % of wireless phone owners use their wireless phones as their primary phones. LNP may be an important part of ensuring that competition with wireline phones continues to grow.

The ability of new entrants to compete with established providers may become an even more important issue as additional deregulatory steps that the Commission has already taken go into effect. For example, the spectrum cap regulations, which limit the amount of spectrum any carrier can hold and thus ensure that there can be at least four competitors in any given market, will sunset January 1, 2003. In the post-spectrum-cap environment, in which some further consolidation may occur, the ability of smaller, new entrants to compete with even larger wireless carriers may be critical to maintaining a vibrant competitive wireless market and thereby ensure that consumers continue to receive the most innovative and affordable services.

For all of these reasons, I support the Commission's conclusion that our LNP rules are consistent with the protection of consumers and thus not to forbear permanently from applying them. I also support the Commission's decision to delay implementing those rules for a period of

one year. Several public safety groups – the National Emergency Number Association (NENA), the Association of Public-Safety Communications Officials-International, Inc. (APCO), and the National Association of State Nine One One Administrators (NASNA) – have sought a sixth-month delay to ensure our E911 rules are implemented effectively in conjunction with LNP. As I have stated before, implementation of E911 must be a fundamental priority, and I agree that a short delay of LNP requirements is appropriate to ensure this implementation is not jeopardized. I also find merit in certain carriers' claims that implementing LNP at the same time that they implement pooling will create hardship, due to the need to ensure the technical workability of each functionality. While I know that some carriers would have liked an even longer delay, I believe we have struck a fair balance between the carriers' needs and those of consumers.

2. Although I support the Commission's conclusion under the forbearance standard adopted by the majority, I would have preferred to change this standard. Section 10 of the Communications Act (47 U.S.C. § 160) states in relevant part: "Any [forbearance] petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it." 47 U.S.C. § 160(c). Subsection (a) in turn states:

[T]he Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a).

I believe that the present item fails to give sufficient content to this language, in particular its use of the term "necessary." Section 10 requires, among other things, that forbearance be granted if enforcement of the challenged regulation is not "necessary" to ensure that charges, practices, etc., are just and reasonable, and enforcement of the regulation is not "necessary" for the protection of consumers. 47 U.S.C. § 160(a). In this item, the Commission does not offer a definition of "necessary," although it suggests that the term means something like "consistent with" or "important." For example, the item's analysis rests on the conclusion that "permanent forbearance from the LNP requirements for CMRS carriers is not *consistent with* the protection of consumers" and finds that "we continue to view wireless LNP as providing *important* benefits to consumers." Order ¶¶ 16, 18 (emphasis added). I find this ambiguity particularly troubling, because, in another context, the Commission has recently argued explicitly that the term "necessary" means "useful" or "appropriate." See FCC's Petition for Rehearing or Rehearing *En Banc*, *Fox Television Stations, Inc. v. FCC*, Nos. 00-1222, *et al.*, 2002 WL 1343461, at 5 (D.C. Cir. Jun 21, 2002) ("Terms such as 'necessary' and 'required' must be read in their statutory context and, so read, can reasonably be interpreted as meaning 'useful' or 'appropriate' rather

than 'indispensable' or 'essential.'"). As I have explained elsewhere, I believe the term "necessary" should mean something more than merely "useful" or "appropriate." See Separate statement of Commissioner Kevin J. Martin, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, CS Docket No. 01-290 (adopted June 13, 2002). Rather, I believe the term should be read in accordance with its plain meaning, to mean something closer to "essential." In any event, I believe that it should mean something more than merely "useful," "appropriate," "consistent with," or "important."

I am also troubled by the fact that this item does not state that the burden, in judging a forbearance petition, is on the Commission. The language of section 10 places affirmative obligations on the Commission. Subsection (c) requires that a forbearance petition is automatically granted (the "petition shall be deemed granted") absent an action of the Commission to deny the petition. Subsection (a) then directs the Commission to "determine" specific factors and then mandates forbearance ("the Commission shall forbear") if those factors are met. This language makes grant of a forbearance petition the default outcome, placing the burden of justifying a denial of a forbearance petition on the Commission. In other words, the statute requires the Commission, when faced with a petition to forbear from applying a particular regulation, to grant the petition unless it can justify continued application of the regulation.

Despite this statutory language, the Commission has, in the past, placed the burden on forbearance petitioners to demonstrate that a regulation is no longer necessary. See, e.g., *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 16857, ¶ 25 (1998) ("[T]he record does not show that today's market conditions eliminate all remaining concerns about whether broadband PCS providers' rates and practices are just, reasonable, and non-discriminatory."). While the present item appears to offer some improvement, it does not address this past precedent or explicitly state where the burden lies. In my view, the Commission ought to clarify that the burden lies with the Commission.

For these reasons, I dissent from the item's discussion of the forbearance standard. These are matters of critical importance to me, and, in this item, are of critical significance. As I explained above, I am comfortable deciding that LNP is "useful" for or even "consistent with" the protection of consumers. However, it is less clear that LNP could meet the more appropriate and higher standard of the statute – "necessary" – and I am disappointed that this question was not the subject of our debate.

**TAB B**

## Hawaiian Telcom

STORE LOCATOR Choose An Island

HOME > RESIDENTIAL > RESIDENTIAL LONG DISTANCE

### NATIONWIDE

Hawaiian Telcom knows everyone has different long distance calling needs, so we created different long distance plans. Stay connected to your far-away family and friends when you want, where you want and how you want. There's a plan designed for you.

**Bundle and Save with Unlimited Nationwide Calling**  
Order the myChoice Bundle with Call More today and get unlimited direct-dialed inter-island and mainland calling 24 hours a day, 7 days a week. Calling to the following U.S. Territories is also included: Guam, Puerto Rico, Northern Mariana Islands, and the U.S. Virgin Islands.

Order any one of our packages online, by calling **643-3222**, or stop by any one of our retail stores throughout the islands.



**CLICK HERE TO ORDER**

Get unlimited long distance calling anywhere in the United States as well as Guam, Puerto Rico, Northern Mariana Islands, and US Virgin Islands for the low price of \$25.00 a month. Or, bundle your services and save even more money. Call anytime. Order Call More today and start saving. It's a big world out there. Get big savings.

Plan	Includes	Additional Plan Info	Monthly fee
Call More <sup>sm</sup>	Unlimited inter-island and mainland calling, 24x7	Unlimited calling also includes calls to the following U.S. Territories: Guam, Puerto Rico, Northern Mariana Islands, and the U.S. Virgin Islands	\$25.00
Simple Saver <sup>sm</sup> Plus	5¢ per minute to anywhere in the U.S., 24x7	Special offer only for customers who also choose a qualifying Hawaiian Telcom local package. Card and in coming toll free calls are only 10¢ per minute.	\$2.00
Simple Saver <sup>sm</sup>	5¢ per minute anytime for mainland calls, 8¢ for inter-island calls, 24x7	Hawaiian Telcom local package not required	\$4.95
Net Saver <sup>sm</sup>	10¢ per minute weekdays, 7¢ per minute weekends to anywhere in	Available for online orders only.	\$1.50

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the U.S., 24x7

**CONSUMER INFORMATION**

Long distance services are subject to service agreements, tariffs, and posted Rates, Terms, and Conditions. Universal Service Fund surcharge, and other fees and taxes apply. Available only to residential customers; may not be available in all areas or on all lines. Charges for direct-dialed domestic long distance calls will vary depending on usage and/or calling plan.

**Call More**

If the Customer uses the Plan for non-Residential voice calling purposes, including but not limited to autodialing; call forwarding of long distance calls; calls to 900/9xx numbers, chat lines, porn lines, online services, or internet access services; data calls; resale; telemarketing; or any commercial or business use such as commercial facsimile, the Company may suspend, restrict or cancel the Customer's service, subject to applicable notice requirements. Call detail is not included with this plan.

Simple Saver Plus rates are available when you subscribe to the qualifying local service and retain Hawaiian Telcom Long Distance as your carrier. If the qualifying local service is removed from your line, we will be glad to serve your long distance needs with the regular Simple Saver plan if another optional calling plan is not selected. Simple Saver inter-island rates are 8¢ per minute and mainland rates are 5¢ per minute and a higher monthly fee applies.

Calling Card Plan	Best For...	Calling Card Rate	Personal Toll Free Rate	Monthly Fee
On The Road Basic	Occasional calling card and/or toll free users	\$0.50 per minute	\$0.25	\$0.00
On The Road Plus	Frequent calling card users and/or toll free users	\$0.10 per minute	\$0.10	\$3.00

Need Help with your calling cards? [Download the dialing guide here.](#)

**PLEASE NOTE:**

- International, Interstate and IntraLATA toll services provided by Hawaiian Telcom Long Distance.
- Long distance services provided pursuant to service agreements and tariffs, where applicable. Rates may be subject to change.
- Hawaiian Telcom Long Distance is not authorized to provide intrastate long distance service outside of Hawaii. Intrastate long distance calling card calls made on the mainland and billed to the Hawaiian Telcom Calling Card will be handled by an alternate carrier selected by Hawaiian Telcom at its sole discretion and billed by Hawaiian Telcom on behalf of the carrier at the alternate carrier's rates. Alternate carrier selection is subject to change without prior notice.
- For international calling, rates will vary by country.
- Calling to certain destinations may be temporarily blocked without prior notice if Hawaiian Telcom deems it necessary to prevent unlawful or fraudulent use of its services.
- A service charge will apply to operator completed calls and a 50¢ surcharge will apply to calls placed from a domestic pay phone.
- Calling Card charges are itemized on your Hawaiian Telcom bill.
- Prices do not include taxes, surcharges, and Universal Service Fees.

\*\$3.00 monthly recurring charge waived with qualifying package.

Pricing information is based upon the state or area code and telephone number you provided. Ranges of prices are offered for some products, and additional charges may apply. Pricing may not reflect current promotional pricing. In the event of a discrepancy between the information contained here and the applicable tariff, the tariff terms shall prevail. If pricing information is not available, contact Hawaiian Telcom for more details. Detailed pricing information will be available when you place your order.

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Location: Honolulu, HI | Cove

## Individual Plans

### All America's Choice<sup>SM</sup> Plans Include:

#### National Calling Minutes

Call any Verizon Wireless customers anytime, without using your plan minutes.

#### No Domestic Roaming or Long Distance Charges

Make or receive calls within the United States & Puerto Rico.

#### Night & Weekend Minutes

Weekdays between 9:00pm and 5:59am  
Weekends from 12:00am Saturday to 11:59pm Sunday

### Pick the plan that's best for you:

#### Basic Plans

Monthly allowance of anytime minutes for making & receiving calls.

Pay per Text, Picture & Video messages or select a monthly Messaging plan starting as low as \$10.

Basic Plans starting at **\$39.99** with 450 Monthly Anytime minutes

#### Select Plans

Unlimited Messaging With anyone. On any network. At any time.

Now enjoy Unlimited Text, Picture & Video Messaging to anyone on any network in the U.S.

Select Plans starting at **\$59.99** with 450 Monthly Anytime minutes

#### Premium Plans\*

New! Unlimited Messaging, navigating, videos and email.

Now get Unlimited Messaging, Video Clips, Mobile Web, VZ Navigator and Mobile Email to anyone on any network in the U.S.

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Now you can test drive America's most reliable wireless network. If you don't love us, you can take your number to someone else, and we'll pay for the calls.

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### WHY BUY ONLINE?

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- 30-day satisfaction guarantee or your money back
- Your information is kept private and secure

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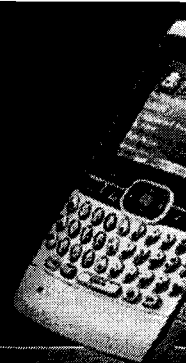




SEARCH

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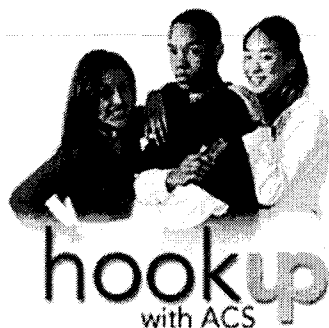
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**Sleek. Sexy. Smart.***and Seriously Fast.*the **Q**  
from Motorola

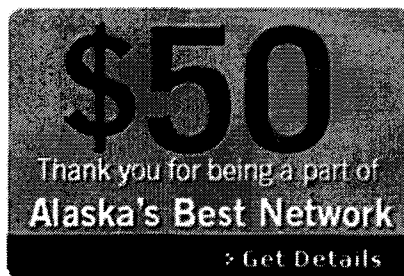
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- > goVocal NEW
- > Wireless
- > Internet
- > Mobile Broadband
- > Local
- > Long Distance

> Sign up for **on**  
ACS**BUSINESS**

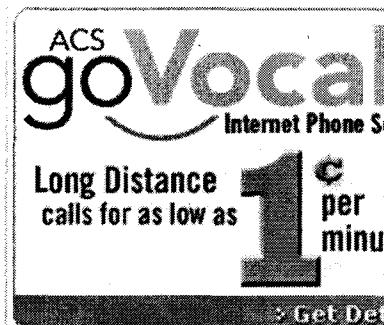
- > Wireless Solutions
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**CUSTOMER SERVICE**

- > Pay Your Bill Online
- > Internet Support Center
- > ACS Store Locations
- > ACS Web Mail
- > Oneplace Online Login
- > Contact ACS
- > Send A Text Message
- > goVocal Member Center Login



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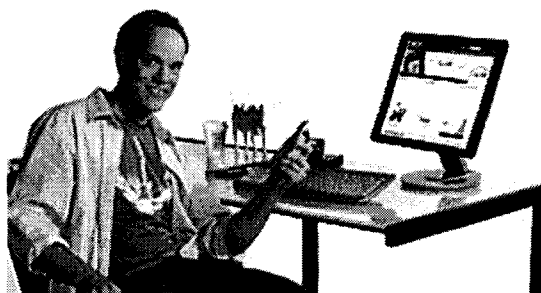


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HOME > Personal > goVocal NEW

- > What is goVocal
- > Features
- > Bundles and Pricing
- > Sign up for goVocal
- > ACS goVocal Member Center
- > Support Documents
- > Price Comparison
- > See an Ad
- > Sign Up for goVocal Express Bundle



### What is ACS goVocal™?

ACS goVocal™ is Internet Phone Service that:

- Gives you amazing rates on high-quality Local and Long Distance service.
- Is easy to use, and easy to install. All you need is a broadband Internet connection from your provider.
- Is loaded with all the features that you get on your traditional home phone service, and a whole lot more.

### Why would I want ACS goVocal™?

ACS goVocal™ will eliminate expensive Long Distance bills.

- You can call in-state and out-of-state for as little as a penny a minute.
- Your second number will let friends and family in that area code call you for free.
- You will save big with amazing International rates.
- And you can get unlimited calling with no Long Distance charges between goVocal™ customers (if the other person lives overseas).

Click [here](#) to find out more about ACS goVocal™ features.

### How do I buy goVocal™?

You have two options:

1. Add goVocal™ to the services you already have. As long as you have a broadband Internet connection, you're eligible for goVocal™ service. Click [here](#) to sign up.
2. Sign up for the goVocal™ Express bundle. This is our best value and gives you ACS High-Speed Internet, goVocal™ and an additional basic Local line.

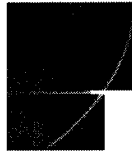
Click [here](#) to find out more about bundles and pricing.

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- Features
- Bundles and Pricing
- Sign up for goVocal
- ACS goVocal Member Center
- Support Documents
- PRICE COMPARISON
- See an Ad
- Sign Up for goVocal Express Bundle

DESTINATION	ACS goVocal™	Skype	Vonage	MCI calling card	
<b>Within Alaska</b>	<b>1¢*</b>	<b>24¢</b>	<b>N/A</b>	<b>6¢</b>	
<b>Canada</b>	<b>1¢*</b>	<b>24¢</b>	<b>N/A</b>	<b>6¢</b>	
<b>Lower 48</b>	<b>1¢*</b>	<b>24¢</b>	<b>N/A</b>	<b>6¢</b>	
<b>London</b>	<b>3¢</b>	<b>21¢</b>	<b>40¢</b>	<b>6¢</b>	
<b>Sydney</b>	<b>4¢</b>	<b>21¢</b>	<b>10¢</b>	<b>9¢</b>	
<b>Mexico City</b>	<b>5¢</b>	<b>21¢</b>	<b>10¢</b>	<b>21¢</b>	
<b>Seoul</b>	<b>5¢</b>	<b>21¢</b>	<b>60¢</b>	<b>11¢</b>	
<b>Moscow</b>	<b>9¢</b>	<b>21¢</b>	<b>70¢</b>	<b>18¢</b>	
<b>Baghdad</b>	<b>9¢</b>	<b>37¢</b>	<b>29¢</b>	<b>\$1.23</b>	

\*ACS rates based on \$29.95 per month, 3,000 minute plan. Broadband Internet connection required. Activation fees and other charges may apply. Contact an ACS Sales & Service Representative for details. MCI and AT&T rates based on speedypin.com, comfi.com, & worldtravelercard.com published on 5/25/2007.

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